

APPEAL NO. 161989
FILED DECEMBER 20, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 2, 2016, with the record closing on August 24, 2016, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by determining that: (1) the compensable injury of (date of injury), does not extend to the bulging disc at L4-5 and L5-S1, neuralgia, hip bursitis, lumbar radiculopathy, and degenerative disc disease at L4-5 and L5-S1; (2) the compensable injury of (date of injury), extends to lumbago, myalgia, and myositis; (3) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on April 16, 2015; (4) the claimant's impairment rating (IR) is five percent; and (5) the claimant had disability from October 28, 2014, through the date of the CCH.

The claimant appealed the hearing officer's extent-of-injury determination that was adverse to him, as well as the hearing officer's MMI and IR determinations. The claimant contended that the preponderance of the medical evidence is contrary to the appealed determinations. The respondent/cross-appellant (carrier) responded, urging affirmance of those determinations. In its response the carrier stated that the hearing officer's determinations on MMI and IR are incorrect and should be reversed.

Records of the Texas Department of Insurance, Division of Workers' Compensation (Division) reflect that the hearing officer's decision was placed in the carrier's Austin representative's box on August 30, 2016. Pursuant to 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), unless the great weight of the evidence indicates otherwise, the carrier is deemed to have received the hearing officer's decision the first working day after the decision was placed in the carrier's Austin representative's box. Therefore, the carrier's deemed date of receipt of the hearing officer's decision is August 31, 2016, because that was the first working day after the date the hearing officer's decision was placed in the carrier's Austin representative's box. With the deemed date of receipt of the hearing officer's decision on August 31, 2016, in accordance with Section 410.202, excluding Saturdays and Sundays, and holidays listed in Government Code Section 662.003, the carrier's cross-appeal had to be filed or mailed no later than Thursday, September 22, 2016. We note that September 5, 2016, Labor Day, is a holiday listed in Government Code Section 662.003, and as such it was excluded in the computation of the 15-day period to file an appeal. The carrier's response was sent to the Division by facsimile transmission on October 12, 2016, and was received by the Division on that same date. The carrier's pleading is timely as a response to the claimant's appeal but as far as it is considered an appeal of the hearing

officer's MMI and IR determinations, it is untimely as a cross-appeal, because it was not received by September 22, 2016.

The hearing officer's determination that the compensable injury of (date of injury), extends to lumbago, myalgia, and myositis was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that he was injured while pulling up an approximately 200-pound steel lid with a pry bar. The hearing officer found in an unappealed finding of fact that the carrier has accepted a (date of injury), compensable injury in the form of a lumbar sprain/strain and a right hip sprain/strain.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to the bulging disc at L4-5 and L5-S1, neuralgia, hip bursitis, lumbar radiculopathy, and degenerative disc disease at L4-5 and L5-S1 is supported by sufficient evidence and is affirmed.

DISABILITY

The hearing officer's determination that the claimant had disability from October 28, 2014, through the date of the CCH is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the

designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.1(c)(3) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined the claimant reached MMI on April 16, 2015, with a five percent IR as certified by (Dr. C), the designated doctor appointed by the Division.

Dr. C initially examined the claimant on June 9, 2015, and in a Report of Medical Evaluation (DWC-69) dated June 18, 2015, certified that the claimant had not reached MMI but was expected to do so on or about August 25, 2016. Dr. C noted in his narrative report impressions of a resolved lumbar sprain, L4-S1 disc bulge, mechanical low back pain SI joint, right side groin pain, and myalgia and hypertonicity of the iliopsoas and iliacus.

Dr. C next examined the claimant on February 2, 2016, for MMI/IR purposes and certified on February 11, 2016, that the claimant reached MMI on April 16, 2015, with a five percent IR. Dr. C noted in his narrative report that his certification was based on the compensable injury of a lumbar sprain/strain "as well as the non-adjudicated finding of hip bursitis, low back pain, [and] muscle pain with inflammation." Dr. C also noted that "the diagnosis of hip bursitis would best be attributed to the right side SI joint dysfunction which I concluded is not part of the compensable injury." As noted above, the hearing officer's finding that the carrier has accepted a lumbar sprain/strain and a right hip sprain/strain was not appealed. Dr. C does not mention or discuss in either of his MMI/IR certifications a right hip sprain/strain. Therefore, Dr. C did not consider and rate the entire compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on April 16, 2015, with a five percent IR.

There are two other MMI/IR certifications in evidence, both from (Dr. D), the post-designated doctor required medical examination (RME) doctor. Dr. D examined the claimant on July 27, 2015, and certified in alternate certifications that the claimant reached MMI on April 16, 2015, with a zero percent IR. In his narrative report Dr. D noted his first MMI/IR certification was based on a lumbar strain, and his second MMI/IR certification was based on a resolved lumbar sprain, L4-S1 disc bulge, mechanical low back pain SI joint, right side groin pain, myalgia, and hypertonicity. Dr. D did not consider a right hip sprain/strain. As discussed above, we have affirmed the hearing officer's determination that the compensable injury of (date of injury), does not extend to the bulging disc at L4-5 and L5-S1, neuralgia, hip bursitis, lumbar radiculopathy, and degenerative disc disease at L4-5 and L5-S1, and the hearing officer's determination that the compensable injury of (date of injury), extends to lumbago, myalgia, and myositis was not appealed and has become final. Neither of Dr. D's MMI/IR

certifications consider and rate the entire compensable injury, and as such neither can be adopted.

There is not an MMI/IR certification in evidence that can be adopted. Therefore, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to the bulging disc at L4-5 and L5-S1, neuralgia, hip bursitis, lumbar radiculopathy, and degenerative disc disease at L4-5 and L5-S1.

We affirm the hearing officer's determination that the claimant had disability from October 28, 2014, through the date of the CCH.

We reverse the hearing officer's determinations that the claimant reached MMI on April 16, 2015, with a five percent IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. C is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. C is still qualified and available to be the designated doctor. If Dr. C is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The parties did not stipulate to the date of statutory MMI, nor did the hearing officer make a finding on the statutory date of MMI. The hearing officer is to ask the parties to stipulate to the date of statutory MMI or to make a finding regarding the date of statutory MMI. The hearing officer is to notify the designated doctor of the date of statutory MMI. The hearing officer is to inform the designated doctor that the compensable injury extends to a lumbar sprain/strain, a right hip sprain/strain, lumbago, myalgia, and myositis, and that the compensable injury does not extend to the bulging disc at L4-5 and L5-S1, neuralgia, hip bursitis, lumbar radiculopathy, and degenerative disc disease at L4-5 and L5-S1.

The hearing officer is to request the designated doctor give an opinion on the claimant's MMI, which can be no later than the statutory date of MMI (Section 401.011(30)), and IR by rating the entire compensable injury as of the date of MMI in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the

American Medical Association prior to May 16, 2000), considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **GREENWICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge